

**United States Department of Labor
Employees' Compensation Appeals Board**

T.M., Appellant

and

**U.S. POSTAL SERVICE, NORTHSIDE
CARRIER FACILITY, Atlanta, GA, Employer**

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**Docket No. 09-395
Issued: August 14, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 24, 2008 appellant, through his representative, filed a timely appeal from the October 24, 2008 merit decision of the Office of Workers' Compensation Programs' hearing representative, which affirm the denial of a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant is entitled to a schedule award for permanent impairment to his cervical spine.

FACTUAL HISTORY

On September 20, 2000 appellant, then a 35-year-old letter carrier, sustained an injury in the performance of duty when he was in a motor vehicle accident. The Office accepted his claim for cervical strain, lumbar strain and left hip contusion. It authorized neck surgery. On April 17, 2006 appellant underwent an anterior cervical discectomy with arthrodesis at C4-6 and placement of an anterior plate and interbody cages.

Appellant claimed a schedule award. On April 4, 2008 the Office denied the claim because evidence of a normal neurological examination did not establish that he had permanent impairment related to his work-related conditions.

On July 10, 2008 Dr. Holmes B. Marchman, a physiatrist, offered an impairment rating. He examined appellant and diagnosed status post anterior discectomy and fusion C4-6, chronic cervical and shoulder myalgias and a history of C6 radiculopathy. He reported 74 percent impairment of the cervical spine and showed how he calculated the rating.

In a decision dated October 24, 2008, an Office hearing representative affirmed the denial of a schedule award. The hearing representative found that appellant had not met his burden of proof, as there was no evidence to support that he sustained permanent impairment of a scheduled member.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act¹ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.²

No schedule award is payable for permanent loss or loss of use of an anatomical member, function or organ of the body not specified in the Act or in the implementing regulations.³ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine, no claimant is entitled to such an award.⁴ Indeed, the Act specifically excludes the back from the definition of "organ."⁵

Amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.⁶

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the scheduled provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment).

⁴ *Tomas Martinez*, 54 ECAB 623 (2003).

⁵ 5 U.S.C. § 8101(19).

⁶ *Rozella L. Skinner*, 37 ECAB 398 (1986).

ANALYSIS

Appellant's physiatrist, Dr. Marchman, examined appellant and applied Table 15-5, page 392 of the A.M.A., *Guides* to rate impairment due to cervical disorders localized to the cervical or cervicothoracic region. He determined that cervical category IV applied, representing a 26 percent impairment of the whole person.⁷ Dr. Marchman then used Chapter 15.13, page 427, to convert the whole person impairment to cervical spine impairment.⁸ He offered no other impairment rating.

Dr. Marchman rated a part of the body not covered by the Act or regulations. A claimant may receive a schedule award for permanent impairment to an arm, leg, hand, foot, eye, thumb, finger and toe, for loss of hearing, loss of vision, serious disfigurement of the face, head or neck,⁹ and for permanent impairment to a breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina.¹⁰ But no claimant may receive a schedule award for permanent impairment to the cervical spine. Inasmuch as the rated impairment involved a part of the body not listed in the schedule, the Office was correct in its determination that appellant was not entitled to an award under the schedule.¹¹ The Board will affirm the Office's October 24, 2008 decision.

CONCLUSION

The Board finds that appellant is not entitled to a schedule award for permanent impairment to his cervical spine.

⁷ Cervical category IV criteria state:

“Alteration of motion segment or bilateral or multilevel radiculopathy; alteration of motion segment integrity is defined from flexion and extension radiographs as at least 3.5 mm of translation of one vertebra on another, or angular motion of more than 11 degrees greater than at each adjacent level Figures 15-3a and 15-3b); alternatively, the individual may have loss of motion of a motion segment due to a developmental fusion or successful or unsuccessful attempt at surgical arthrodesis; radiculopathy as defined in cervical category III need not be present if there is alteration of motion segment integrity *or* fracture: (1) more than 50 percent compression of one vertebral body without residual neural compromise.”

⁸ The whole person estimate being converted to a regional estimate is divided by 0.35 for the cervical spine.

⁹ 5 U.S.C. § 8107(c).

¹⁰ 20 C.F.R. § 10.404(a).

¹¹ *Felton D. Roberts*, 11 ECAB 307 (1960) (impairment of 15 to 20 percent of the lumbar spine).

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board